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DEPARTMENT OF THE TREASURY

48 CFR Chapter 10

RIN 1505-AC40

Department of the Treasury Acquisition Regulations; Contract Clause on Minority and Women Inclusion in Contractor Workforce

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of proposed rulemaking

SUMMARY: The Department of the Treasury (the Department) is proposing to amend the Department of the Treasury Acquisition Regulation (DTAR) to include a contract clause on minority and women inclusion, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act).

DATES: Comment due date: [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: Interested persons are invited to submit comments on all aspects of this proposed rule through one of these methods:

Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Department to make them available to the public. Comments submitted electronically through the <http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public.

Mail: Department of the Treasury, Office of Minority and Women Inclusion, Attention: Contractor Clause, Room 2438, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

Fax and email comments will not be accepted.

Instructions: In general, the Department will enter all comments received into the docket and make them available, without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers.

Comments, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Properly submitted comments will be available for inspection and downloading at <http://www.regulations.gov>.

You may personally inspect comments at the Department of the Treasury Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, N.W., Washington, D.C. You can make an appointment to inspect comments by calling (202) 622-0990.

FOR FURTHER INFORMATION CONTACT: Lorraine Cole, Director, Office of Minority and Women Inclusion, 202-927-8181 or lorraine.cole@treasury.gov.

SUPPLEMENTARY INFORMATION:

Section 342 of the Dodd-Frank Act, 12 U.S.C. 5452, establishes an Office of Minority and Women Inclusion (OMWI) in each of certain agencies, including the Departmental Offices of the Department of the Treasury. Section 342(c)(2) provides that covered agencies shall require contractors to provide a written statement that the “contractor shall ensure, to the maximum extent possible, the fair inclusion of women and minorities in the workforce of the

contractor, and as applicable, subcontractors.” This rule will implement the statement required by the Dodd-Frank Act through a contract clause.

The proposed contact clause, which is similar to those adopted by other OMWI agencies, requires that a contractor make good faith efforts to include minorities and women in its workforce. This standard is derived from section 342(c)(3) of the Dodd-Frank Act, which provides for remedies, including termination, against a contractor who fails to make good faith efforts to include minorities and women in its workforce. Treasury interprets “good faith efforts” to mean efforts consistent with the Equal Protection Clause of the Constitution and Title VII of the Civil Rights Act of 1964, such as the identification and elimination of employment barriers, the widespread publication of employment opportunities, and other forms of outreach to minorities and women.

Section 342 applies to “all contracts . . . for services of any kind,” but the section does not define the term “contract.” Treasury proposes to apply the clause to all service contracts above the simplified acquisition threshold. As noted above, section 342 applies to Treasury Departmental Offices (DO). DO does not currently include an office responsible for operational procurement; acquisitions in support of DO are performed primarily by the Internal Revenue Service Office of Treasury Procurement Services. The clause will be included in all contracts in support of requirements originating from DO, regardless of the Treasury component performing the acquisition.

Procedural Matters

Public Comment

Because this proposed rule relates to public contracts, it is exempt from the requirements of 5 U.S.C. 553. However, it is being published for public comment pursuant to 41 U.S.C. 1707.

Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) generally requires agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute; unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities and thus no initial regulatory flexibility analysis is required.

First, this rule will not affect a substantial number of small entities. While this rule will affect all contracts for services above the simplified acquisition threshold (\$150,000), it will not affect a substantial number of small entities because it will only apply to those entities that actually contract with Departmental Offices. In fiscal year 2011, DO contracted with 370 small businesses.

Additionally, the rule's economic impact is not expected to be significant. The rule satisfies the statutory requirement that contractors affirm a commitment to the fair inclusion of minorities and women in the workforce, but does so in a way that minimizes burden on contractors. The rule provides maximum flexibility for contractors in implementing the statutory requirement because it does not impose any specific requirements on contractor hiring. Further,

most contractors are already subject to and have implemented other FAR requirements that will satisfy this rule's requirements. Essentially all contracts to which this requirement applies are subject to FAR Clause 52.222-26, Equal Opportunity, which requires, among other things, that contractors complete the EEO Form 1 containing workforce demographic data. Thus, contractors are already required to compile and retain much of the data required by this clause. Further, contractors with over 50 employees are required by Department of Labor regulations to develop affirmative action plans; development of and compliance with such a plan would normally satisfy the requirements of the clause.

Notwithstanding the certification that this rule, if finalized, would not have a significant economic impact on a substantial number of small entities, the Department invites comments on the rule's impact on small entities.

Executive Order 12866

This proposed rule is not a "significant regulatory action" for the purposes of Executive Order 12866.

Paperwork Reduction Act

The information collections contained in the notice of proposed rulemaking have been previously approved by the Office of Management and Budget (OMB) and assigned control number 1505-0080. Under the Paperwork Reduction Act (44 U.S.C. chapter 35), an agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB control number.

Lists of Subjects in 48 CFR Parts 1022 and 1052

Government procurement.

Dated _____ August 8, 2012 _____

Lorraine Cole, Director, Office of
Minority and Women Inclusion
Department of the Treasury

For the reasons set forth in the preamble, the Department proposes to amend 48 CFR
Chapter 10 as follows:

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 1022—MINORITY AND WOMEN INCLUSION

1. Add part 1022 to read as follows:

Subpart 1022.7 Fair Inclusion of Minorities and Women in Contractor's Workforce

Sec.

1022.7000 Contract clause.

Authority: 12 U.S.C. 5452.

Subpart 1022.7 Fair Inclusion of Minorities and Women in Contractor's Workforce

1022.7000 Contract clause.

Insert the clause at 1052.222-70, Minority and Women Inclusion, in all solicitations and contracts in support of Departmental Offices for services that exceed the simplified acquisition threshold.

SUBCHAPTER H—CLAUSES AND FORMS

PART 1052 – SOLICITATION PROVISIONS AND CONTRACT CLAUSES

2. Add subpart 1052.2 to read as follows:

Subpart 1052.2-Texts of Provisions and Clauses

Sec.

1052.222-70 Minority and Women Inclusion

Authority: 12 U.S.C. 5452(c)(2).

Subpart 1052.2-Texts of Provisions and Clauses

1052.222-70 Minority and women inclusion.

As prescribed in 1022.7000, insert the following clause:

“Contractor confirms its commitment to equal opportunity in employment and contracting. To implement this commitment, the Contractor shall ensure, to the maximum extent possible consistent with applicable law, the fair inclusion of minorities and women in its workforce. The Contractor shall insert the substance of this clause in all subcontracts under this Contract whose dollar value exceeds \$150,000. Within ten business days of a written request from the contracting officer, or such longer time as the contracting officer determines, and without any additional consideration required from the Agency, the Contractor shall provide documentation, satisfactory to the Agency, of the actions it (and as applicable, its subcontractors) has undertaken to demonstrate its good faith effort to comply with the aforementioned provisions. For purposes of this contract, “good faith effort” may include actions by the

contractor intended to identify and, if present, remove barriers to minority and women employment or expansion of employment opportunities for minorities and women within its workforce. Efforts to remove such barriers may include, but are not limited to, recruiting minorities and women, providing job-related training, or other activity that could lead to those results.

“The documentation requested by the contracting officer to demonstrate “good faith effort” may include, but is not limited to, one or more of the following:

1. The total number of Contractor’s employees, and the number of minority and women employees, by race, ethnicity, and gender (e.g., an EEO-1);
2. A list of subcontract awards under the Contract that includes: dollar amount, date of award, and subcontractor’s race, ethnicity, and/or gender ownership status;
3. Information similar to that required in item 1, above, with respect to each subcontractor; and/or
4. The Contractor’s plan to ensure that minorities and women have appropriate opportunities to enter and advance within its workforce, including outreach efforts.

“Consistent with Section 342(c)(3) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203) (Dodd-Frank Act), a failure to demonstrate to the Director of the Agency’s Office of Minority and Women Inclusion such good faith efforts to include minorities and women in the Contractor’s workforce (and as applicable, the workforce of its subcontractors), may result in termination of the Contract for default, referral to the Office of Federal Contract Compliance Programs, or other appropriate action.

“For purposes of this clause, the terms “minority,” “minority-owned business” and “women-owned business” shall have the meanings set forth in Section 342(g) of the Dodd-Frank Act.”

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